

1 THE HONORABLE JOHN C. COUGHENOUR  
2  
3  
4  
5  
6

7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 HOLLAND AMERICA LINE, N.V., d/b/a  
11 HOLLAND AMERICA LINE, N.V., L.L.C., a  
12 Washington limited liability corporation, *et al.*,

13 CASE NO. C17-1726-JCC

14 ORDER

15 Plaintiffs,

16 v.

17 ORIENT DENIZCILIK TURIZM SANAYI  
18 VE TICARET, A.S., d/b/a SEA SONG  
19 TOURS, a Turkish corporation, *et al.*,

20 Defendants.

21 This matter comes before the Court on Defendants' motion to compel (Dkt. No. 78).

22 Having considered the parties' briefing and the relevant record, the Court hereby DENIES the  
23 motion as moot but AWARDS Defendants their reasonable expenses incurred in making the  
24 motion, including attorney fees.

25 **I. BACKGROUND**

26 On June 3, 2019, Plaintiffs served their initial disclosures. (Dkt. No. 79 at 17.) Those  
disclosures did not contain computations of the categories of damages Plaintiffs claimed or the  
documents and other evidentiary material on which Plaintiffs based any such computations. (See  
Dkt. No. 79 at 15.) Instead, Plaintiffs disclosed, "Plaintiffs seek compensatory damages,  
incidental damages, and consequential damages due to Defendants' breach of contract. These

1 damages far exceed \$75,000. Plaintiffs will provide evidence of the specific amount of their  
2 damages at time of and in accordance with the Federal Rules of Civil Procedure 26(f) expert  
3 disclosures.” (*Id.*)

4 On September 4, 2019, each Defendant served interrogatories on Plaintiffs asking  
5 Plaintiffs to “[d]escribe in full all losses or damages that Seabourn incurred as a result of  
6 Defendant’s acts or omissions.” (*See, e.g., id.* at 26.) Plaintiffs responded by referring  
7 Defendants to the fourth amended complaint and by stating that “Plaintiffs are currently  
8 assessing the total damages due to Defendants’ acts or omissions.” (*See, e.g., id.* at 26.) On  
9 October 15, 2019, Defendants mailed Plaintiffs a letter stating that Plaintiffs’ initial disclosures  
10 and responses to interrogatories did not comply with Federal Rule of Civil Procedure  
11 26(a)(1)(A)(iii). (*See id.* at 63–65.)

12 On October 23, 2019, Defendants convened a telephone conference with Plaintiffs to  
13 discuss, among other issues, Plaintiffs’ obligations under Rule 26(a)(1)(A)(iii). (*See id.* at 2.)  
14 During the telephone conference, Defendants agreed that Defendants would not move to compel  
15 Plaintiffs to comply with Rule 26(a)(1)(A)(iii) while Plaintiffs supplemented their interrogatory  
16 responses. (*Id.* at 2.) Plaintiffs subsequently supplemented their responses on November 4, 2019.  
17 (*See, e.g., id.* at 76.) The supplemental response was as follows:

18 Although Plaintiffs performed all agreed promotion of Defendants’ recommended  
19 merchants and wares in 2016 and although throughout 2015 Defendants sent  
20 Plaintiffs repeated reports showing monies that were owed by Defendants to  
21 Plaintiffs based on sales, Defendants failed and refused to pay Plaintiffs for their  
22 2015 promotional services after learning they had been outbid by another company  
23 for the 2016 Shopping Marketing Agreement. The exact amount of loss is currently  
24 being calculated and will be provided when evaluations are completed. Discovery  
25 is continuing and Plaintiffs reserve the right to supplement this response.

26 (*Id.*)

27 After receiving Plaintiffs’ response, Defendants sent Plaintiffs a letter on December 11,  
28 2019, stating that Rule 26(a)(1)(A)(iii) entitled them to a computation of damages at the outset of  
29 discovery and that Plaintiffs had failed to satisfy that obligation. (*See id.* at 159.) Defendants also

1 convened a telephone conference on December 19, 2019, during which Defendants informed  
2 Plaintiffs that they would move to compel Plaintiffs to provide a computation of damages and  
3 supporting documents if Plaintiffs did not provide the computation and documents by January 3,  
4 2020. (*See id.* at 3.)

5 Plaintiffs did not provide the computation or documents by January 3, 2020. (*See id.*)  
6 Consequently, Defendants filed the instant motion to compel on January 23, 2020. (Dkt. No. 78.)  
7 Eight days after Defendants filed their motion, Plaintiffs informally emailed certain documents  
8 relating to a computation of damages they were preparing. (*See* Dkt. Nos. 80-1 at 2, 80-2 at 2-3,  
9 80-3 at 2-16.) Plaintiffs then served a supplemental response to Defendants' interrogatories on  
10 February 3, 2020—the same day Plaintiffs filed a response to Defendants motion to compel. (*See*  
11 Dkt. No. 80-5 at 9.) The supplemental response disclosed a computation of Plaintiffs damages.  
12 (*See id.*) Defendants appear to consider the disclosure to be adequate, but they now request their  
13 reasonable expenses incurred in bringing their motion to compel. (*See* Dkt. No. 81 at 1-2.)

## 14 **II. DISCUSSION**

### 15 **A. Plaintiffs' Obligations Under Rule 26(a)(1)(A)(iii).**

16 Rule 26(a)(1)(A)(iii) requires a party to disclose without request "a computation of each  
17 category of damages claimed by the disclosing party" and "the documents or other evidentiary  
18 material, unless privileged or protected from disclosure, on which each computation is based."  
19 The party must make the disclosure "within 14 days after the parties' Rule 26(f)  
20 conference . . . unless a party objects during the conference that initial disclosures are not  
21 appropriate in this action." Fed R. Civ. P. 26(a)(1)(C). In this case, that conference presumably  
22 took place before the status conference held on April 16, 2019, and there is no indication that  
23 Plaintiffs objected at the Rule 26(f) conference to providing a computation of damages. *See* Fed.  
24 R. Civ. P. 26(f)(1) (requiring parties to hold a Rule 26(f) conference at least 21 days before a  
25 scheduling conference); (Dkt. No. 73) (minute entry regarding the April 16, 2019 status  
26 conference). Thus, Plaintiffs were required to provide a computation of damages well before

1 February 3, 2020. Plaintiffs did not do so. Consequently, Plaintiffs violated Rule 26(a).

2 **B. Defendants' Request for Costs and Fees**

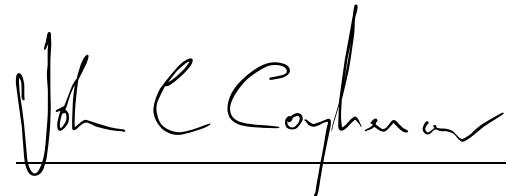
3 "If a party fails to make a disclosure required by Rule 26(a), any other party may move  
4 to compel disclosure for appropriate sanctions." Fed. R. Civ. P. 37(a)(1). Ordinarily, "if the  
5 disclosure . . . is provided after the motion was filed[,] the court must . . . require the  
6 party . . . whose conduct necessitated the motion . . . to pay the movant's reasonable expenses  
7 incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). This  
8 mandatory fee-payment rule has three exceptions: (1) "the movant filed the motion before  
9 attempting in good faith to obtain the disclosure . . . without court action"; (2) "the opposing  
10 party's nondisclosure . . . was substantially justified"; or (3) "other circumstances make an award  
11 of expenses unjust." *See id.* In the Western District of Washington, "[a] good faith effort to  
12 confer with a party or person not making a disclosure or discovery requires a face-to-face  
13 meeting or a telephone conference." W.D. Wash. Local Civ. R. 37(a)(1).

14 Here, Plaintiffs provided the computation of damages and supporting documents after  
15 Defendants filed their motion to compel. In addition, none of the exceptions to the mandatory  
16 fee-payment rule apply. First, Defendants met and conferred twice via telephone about Plaintiffs'  
17 disclosure obligations. (*See* Dkt. No. 79 at 3.) Second, Plaintiffs were not substantially justified  
18 in failing for months to provide a computation of damages. The only justification Plaintiffs offer  
19 is that they were conducting discovery, (*see* Dkt. No. 80 at 4), but Rule 26(a)(1)(A)(iii)'s  
20 purpose is to ensure that defendants receive a preliminary damages estimate at the outset of  
21 litigation—before discovery has commenced. *See BBC Group NV LLC v. Island Life Rest. Group*  
22 *LLC*, Case No. C18-1011-RSM, Dkt. No. 43 at 4–5 (W.D. Wash. 2019). Finally, there are no  
23 circumstances that would make an award of expenses unjust. Plaintiffs are sophisticated business  
24 entities that are more than capable of complying with Rule 26(a)'s initial disclosure  
25 requirements.

1      **III. CONCLUSION**

2            For the foregoing reasons, the Court DENIES Defendants' motion to compel (Dkt. No.  
3            79) as moot but AWARDS Defendants' reasonable expenses incurred in making the motion,  
4            including attorney fees. Defendants shall submit their application for attorney fees to the Court  
5            within 14 days of the date this order is issued.

6            DATED this 7th day of April 2020.

7  
8  
9  
10              
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

John C. Coughenour  
UNITED STATES DISTRICT JUDGE